IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
(Martinsburg Division)

BANK OF CHARLES TOWN,

Plaintiff,

v. **CIVIL ACTION NO. 3:10-cv-102JPB**
(Removed from the Circuit Court of Jefferson County, No. 10-C-312)

ENCOMPASS INSURANCE,
ENCOMPASS INDEMNITY COMPANY,
MICHELLE GROSSMAN,
JOHN WILSON, AND JOHN OR JANE DOE,

Defendants.

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS
Of MICHELE GROSSMAN

COMES NOW Defendant Michele Grossman **(**incorrectly identified as Michelle Grossman)**,** by and through her counsel, E. Kay Fuller and Martin & Seibert, L.C., and moves this Court pursuant to Rule 12(b)(5) and (6) of the Federal Rules of Civil Procedure to quash any attempt at service of the Summons and Complaint upon her through the West Virginia Secretary of State, to dismiss any claims against her for insufficient service of process and to the extent the Plaintiff makes numerous allegations against the "Encompass defendants" to dismiss those which can not by law include Michele Grossman.

In further support of her Motion the Defendant would state as follows:

STATEMENT OF FACTS

Plaintiff herein, Bank of Charles Town (hereinafter "Bank") instituted suit in the Circuit Court of Berkeley County, West Virginia seeking recovery for alleged water damage to property located at 11 Seattle Slew Way, Martinsburg, West Virginia under a homeowner's policy issued by Encompass Indemnity Company to Monte Palmer and Suzette Palmer. (see Exhibit B to Plaintiff's Complaint).

Michele Grossman (incorrectly identified in the Complaint as Michelle Grossman) is an adjuster who investigated the claim. (see Complaint, ¶4). Ms. Grossman is a resident of Pennsylvania (see Complaint, ¶4). Ms. Grossman is not a party to the insurance contract. (see Exhibit B to Plaintiff's Complaint).

The Bank has alleged breach of contract, breach of the duty of good faith and fair dealing, violations of the Unfair Trade Practices Act, seeks declaratory judgment , allege estoppel/ waiver and seeks recovery of *inter alia* punitive damages. Throughout the Complaint, Bank makes references to "the Encompass Defendants." (see e.g., Complaint ¶37).

Upon filing its Complaint, the Bank attempted to serve Ms. Grossman through the West Virginia Secretary of State who accepted service on or about September 7, 2010. (see Service of Process Search information of West Virginia Secretary of State, attached hereto as **Exhibit A).**[1] Because this document is a matter of public record, the Court may take judicial notice of the documentation when considering the present motion to dismiss.

[1] John Willson (incorrectly named in the Complaint as John Wilson) was also named in the Complaint. To date, there has been no service, nor attempt at service upon Mr. Willson.

ARGUMENT

A. Bank's Complaint alleging breach of contract, breach of the covenant of good faith and fair dealing, seeking a declaratory judgment and alleging estoppel/waiver must be dismissed with prejudice against Defendant Grossman

Ms. Grossman is an individual insurance adjuster. However, she is not a party to the insurance contract between Encompass Indemnity Company and Monte and Suzette Palmer of which Bank alleges an additional insured interest. As such, Ms. Grossman is not in privity of contract with the Palmers nor with the Bank. It is axiomatic that a party who is not in privity of contract can not be held liable for a breach of that contract. Furthermore, because she is not a party to the contract, Ms. Grossman can not be held liable for any common law "bad faith" claims as set forth in Count I of the Complaint. *Ash v Allstate Ins. Co.,* 2010WL3788045 (N.D.W.Va., 2010) (Civil Action No. 5:10-cv-5, Stamp, J); *Grubbs v Westfield Ins. Co.,* 430 F.Supp.2d 563 (N.D.W.Va., 2006).

Likewise, any attempt to construe the policy of insurance between Encompass Indemnity Company and the Palmers is extraneous to Ms. Grossman. Therefore, those counts of the Complaint which allege allegations against "the Encompass Defendants" which concern solely the contract which Ms. Grossman is not a party to are improperly plead against her. Thus, Counts I, II and the unnumbered Count entitled "Estoppel/Waiver" must be dismissed with prejudice against Defendant Grossman as they make allegations beyond her involvement in this matter.

Thus, the only potentially viable count against Ms. Grossman is Count II which purports to assert violations of the Unfair Trade Practices Act "against all defendants." However, Ms. Grossman has not been properly served with the Summons and

Complaint in this action and therefore this count must also be dismissed for insufficiency of service of process.

B. The West Virginia Secretary of State can not accept service of process for on out-of-state individual insurance adjuster and thus attempted service must be quashed

To pursue Count II of the Complaint against an individual defendant, the Bank must serve its Summons and Complaint upon each defendant individually in compliance with the West Virginia Rules of Civil Procedure. Rule 4(d) sets for the manner of service and states:

> **(d) Manner of Service**. Personal or substituted service shall be made in the following manner:
>
> (1) *Individuals.* Service upon an individual other than an infant, incompetent person, or convict may be made by:
>
> (A) Delivering a copy of the summons and complaint to the individual personally; or
>
> (B) Delivering a copy of the summons and complaint at the individual's dwelling place or usual place of abode to a member of the individual's family who is above the age of sixteen (16) years and by advising such person of the purport of the summons and complaint; or
>
> (C) Delivering a copy of the summons and complaint to an agent or attorney-in-fact authorized by appointment or statute to receive or accept service of the summons and complaint in the individual's behalf; or
>
> (D) The clerk sending a copy of the summons and complaint to the individual to be served by certified mail, return receipt requested, and delivery restricted to the addressee; ...

W. Va. R. Civ. P. 4.

Strict compliance with Rule 4 is required. *McClay v. Mid-Atlantic Country Magazine*, 435 S.E.2d 180, 185 (W. Va. 1993). To date Bank has served only one individual Defendant, Grossman, and only through the West Virginia Secretary of State, who then mailed the process to Grossman's workplace in Pennsylvania. This attempt to serve Defendant Grossman, however, is void.

The Secretary of State is the authorized attorney in fact to accept service of process on public corporations and agencies, she is not authorized to act as attorney in fact for individuals who reside outside the state of West Virginia. Moreover, service via the Secretary of State is not one of the enumerated methods of permissible service upon individuals under Rule 4(d)(1) which governs service upon individuals. The Bank is granted five options under Rule 4(d)(1) as to how to serve an individual defendant it intends to join in a West Virginia Civil action: personal service, substituted service at the individual's dwelling place or usual place of abode upon a member of the individual's family over the age of 16, delivery to an agent or attorney-in-fact authorized by appointment or statute to accept service, certified mail, return receipt requested and restricted delivery or by first class mail with two copies of a notice and acknowledgement. None of the prescribed methods were employed by the Bank herein and thus the purported attempt to serve Ms. Grossman through the West Virginia Secretary of State is void and must be quashed.

Lacking proper service, the Complaint against Michele Grossman must be dismissed pursuant to Rule 12(b)(5) of the Federal Rules of Civil Procedure.

CONCLUSION

The Bank can not assert contract-related claims against an individual adjuster who is not a party to the contract. It likewise follows an individual adjuster can not be held liable for common law "bad faith" claims arising from the contract. To the extent Bank's Complaint includes "the Encompass Defendants" which arguably includes Michele Grossman within that terminology, said claims against her must be dismissed with prejudice, leaving only a potentially viable UTPA claim against Ms. Grossman. However, Ms. Grossman has not been properly served with the Summons and Complaint in this action pursuant to the specifically enumerated methods of service under Rule 4(d) of the West Virginia Rules of Civil Procedure. Therefore, any attempt at service through the West Virginia Secretary of State must be quashed pursuant to Rule 12(b)(5) of the Federal Rules of Civil Procedure for insufficient service of process and the claim as presently plead against Michele Grossman dismissed.

The purported Defendant Michele Grossman respectfully moves for dismissal with prejudice of Counts I, III and the unnumbered count entitled Estoppel/Waiver and moves to quash service upon the remaining count of the Bank's Complaint.

MICHELE GROSSMAN
By Counsel

MARTIN & SEIBERT, L.C.

/s/ E. Kay Fuller________
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CERTIFICATE OF SERVICE

I, E. Kay Fuller, counsel for Michele Grossman, hereby certify that on the _____ day of _____________**, 2010**, served the ***Memorandum of Law in Support of Motion to Dismiss of Michele Grossman,*** upon the counsel identified below, *via* United States Mail, first-class prepaid, and facsimile transmission, and filed the instant Certificate with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Stephen G. Skinner, Esquire
Laura C. Davis, Esquire
SKINNER LAW FIRM
P.O. Box 487
Charles Town, WV 25414

Brent K. Kesner, Esquire
KESNER, KESNER & BRAMBLE, PLLC
112 Capital Street
P.O. Box 2587
Charleston, WV 25329

__/s/E. Kay Fuller______________

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Service Of Process Search Item Detail

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Service Information	
Civil Action	10-C-312
Defendant	Michelle Grossman
Agent	
City/State/Zip	Reading , PA 19612-6203
Country	US - United States of America
County	Jefferson
Service Date	9/7/2010
Delivery Information	
Certified Number	9171923790001000311347
Delivered Date	9/13/2010 5:24:00 AM
Delivered	YES
Status Details	DELIVERED (Complete list of USPS status descriptions)
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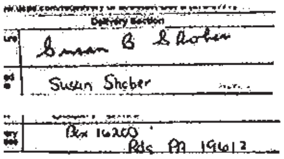

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